IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8568 OF 2007

Mohan Taniya Maidan .. Petitioner

Versus

Asmita Mogra Coop.Housing

Society Ltd. .. Respondents

Mr.A.R.Mishra for petitioner

Mr.A.L.N.Khatri for respondents.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 6th December 2007

P.C.

. Heard Mr.Mishra for petitioner and Mr.Khatri for respondents. Perused the petition and the annexures thereto, including the order

under challenge. The same is passed on an application preferred by the present petitioner seeking condonation of delay in filing written statement and praying that written statement be allowed to be filed and taken on record.

2. The order passed by the trial court is a direction to proceed ex-parte (no W.S). The said order was passed on 6th August 2003. However, the reason why the application is rejected is two fold. Firstly, it is pointed out that assuming that the applicant petitioner was away from Mumbai and residing at his native place on account of his illness, there are no details provided of the time for which he was required to be at his native place and what prevented him from giving instructions to his lawyer accordingly. Secondly, it is stated that the order was passed on 6th August 2003 whereas the application is filed after considerable delay. In such circumstances, the court observed that

the petitioner does not deserve any sympathy.

3. Although the application which was filed by the Constituted Attorney of the petitioner before the trial court did not set out all requisite details, yet, in answer to the said application, an affidavit in reply was filed. Dealing with the contents of the said affidavit, even a rejoinder came to be filed in which it was specifically stated by the Constituted Attorney who is none other than daughter of the petitioner that her father suffers from cancer. The petitioner was diagnosed such and thereafter left Mumbai. He was advised to take rest in a more relaxed atmosphere. However, he continued to be under treatment and all details pertaining thereto have been filed. It is not as if the learned Judge disbelieves this reason. However, he seeks specific details year-wise with regard to the ailment and the treatment. To my mind, when the daughter of the petitioner and even

nephew were taking care of the petitioner when he was diagnosed with serious ailment, this sort of an approach can safely be termed hyper-technical. In the peculiar facts of this case, when medical papers were produced and reason was found genuine, then, the learned Judge could have given one more opportunity to the petitioner to defend himself.

4. Mr.Mishra prays for last opportunity to petitioner for doing so. On the last occasion when a complaint was made by Mr.Khatri that the petitioner is not in occupation of the suit premises and possession is stated to be either with his daughter or with somebody else, I invited attention of Mr.Mishra to the verification of this petition which is by one Krishna Shettigar. Mr.Mishra stated that he is none other than the nephew of the petitioner. Now an affidavit has been filed by the daughter and the nephew of the petitioner clarifying that

they have no interest in the property nor are they in possession thereof in their own right. It is the petitioner who is occupant and claims possession in the property. In such circumstances, even the bonafides of petitioner are proved. Therefore, in the peculiar facts of this case, I am of the opinion that the impugned order deserves to be set aside as the learned Judge fails to exercise discretion in accordance with law and settled principles.

5. Accordingly, the petition succeeds. The impugned order is quashed and set aside. Application preferred by the petitioner before the trial court is allowed and the delay stands condoned. Defendant is permitted to file his written statement in the suit, if not, already filed. Mr.Mishra states that the written statement is ready and would be tendered within ten days from today.

6. In the facts and circumstances of the case, there will be no order as to costs. However, it is clarified that if the written statement is not filed within ten days from today, the trial court to proceed in the absence thereof. Further, the petitioner to cooperate in the early disposal of this case. Considering the ailment of the present petitioner, it is desirable and in the interest of justice that hearing of the suit is expedited. Mr.Mishra states that copy of power of attorney would be handed over to Mr.Khatri, including all details. Petition disposed of with the aforesaid directions. No costs.

(S.C.Dharmadhikari, J)